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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 160

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

MOTION TO AFFIRM BY APPELLEES NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY, AMERICAN STEEL FOUNDRIES, THE BUCKEYE STEEL CASTINGS COMPANY, SYMINGTON WAYNE CORPORATION AND McCONWAY & TORLEY CORPORATION

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MOTION TO AFFIRM

The above-named appellees move, pursuant to Rule 16.1 (c) of the Rules of this Court, that the Court affirm the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, in Civil Action No. 30281, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, for the following reasons:

1. This being a civil action by the United States requesting equitable injunctive relief, the granting or denial of that request lay within the sound discretion of the District Court.

2. Appellant, in its Jurisdictional Statement filed herein, fails to argue or show any abuse of discretion by the District Court, but rather seeks a trial *de novo* in this Court.

3. In a case based entirely on circumstantial evidence, the District Court's rejection of the inferences of illegality urged by appellant, and the District Court's acceptance of inferences of legality consistent with the circumstantial evidence and supported by the uncontradicted oral testimony of the responsible officers of appellee manufacturers, is not an abuse of discretion and presents no substantial question for consideration by this Court.

STATEMENT

This is an expedited appeal to this Court in a civil antitrust case, charging that appellee manufacturers monopolized and conspired to monopolize, and conspired to fix prices in, the manufacture and sale of standard railroad couplers.[1] In the trial of this case over a period of about two months, some 3,000 pages of transcript were made, over 2,000 exhibits were offered, and many stipulations of fact were filed in the Trial Court. As a part of its case

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[1] Appellee manufacturers consist of five defendant manufacturers of couplers; appellee, Symington Wayne Corporation, is the successor to The Symington-Gould Corporation. Appellant's off-record reference to the criminal proceedings (Jur. Stmt. 5) fails to identify National Malleable, the largest manufacturer of standard couplers, and its First Vice President, Moriarty, as the defendants who, rather than pay fines agreed to by appellant substantially less in amount than the probable cost of defense, stood trial and were acquitted of charges identical with those in the civil case.

in chief, appellant offered the testimony of almost forty witnesses, principally officers and employees of appellees.

Appellant stated at the outset of this case that "it would have a circumstantial case as to these defendants, and that it would not prove its case by direct evidence." (District Court's Opinion, App. A, Jur. Stmt. 24; Tr. 31) Illegality and the need for injunctive relief were to be *inferred*[2] from this circumstantial evidence.

The Trial Court, in a 50-page oral opinion, analyzed the contentions of appellant as to the inferences of illegality to be drawn from the evidence, and having judged the credibility of the witnesses testifying before him, rejected these inferences. Soundly exercising his judicial discretion, the Trial Judge held that no showing had been made justifying the extraordinary remedy of injunction (Fdg. 82).[3]

Appellant now asks this Court to review that exercise of judicial discretion by the Trial Judge. *It seeks to urge de novo on this Court the inferences rejected so categorically by the Trial Court.* We submit, however, that the uncontroverted evidence so clearly supports the Trial Judge's rejection of the inferences of illegality urged by appellant as to render any further argument before this Court needless.

Appellant, pre-occupied with fifty years of history (Jur. Stmt. 5-15), gives scant attention to the conditions existing in the railroad coupler industry *today*. As clearly reflected in the opinion (Jur. Stmt. App. A) and the Findings of Fact below, the Trial Judge considered these present day conditions to be of fundamental importance in concluding that there was no necessity for the issuance of any relief.

One of the most striking features of this industry, as viewed by the Trial Judge, was the fact that standard rail-

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[2]Emphasis throughout is ours unless otherwise indicated.

[3]The Findings of Fact and Conclusions of Law of the Trial Court are Appendix I hereto.

road couplers manufactured by each of the appellee manufacturers had to be "exactly alike and completely interchangeable and fungible."[4] (Jur. Stmt. App. A, 41). As appellant recognizes, the six basic parts of a standard coupler can be interchanged with the same parts of that particular type of "standard coupler regardless of which manufacturer produces the part or the coupler." (Jur. Stmt. 13).

Notwithstanding this identity of product, the record before the Trial Court overwhelmingly and without contradiction attested to the vigorous, intense, cut-throat competition existing since 1945 in this industry, characterized by the Trial Judge as "what is colloquially called a cat and dog fight, for business and survival." (Jur. Stmt., App. A, 38).

Appellant, recognizes, as it must, that appellee manufacturers "have actively competed with each other for business." (Jur. Stmt. 18).

The patent-owning appellee manufacturers, since 1945, have granted non-exclusive licenses to each other and to the non-patent-owning appellee manufacturers at nominal royalties under their complementary patents to manufacture and sell standard couplers without any restrictions on the licensee's business or prices (Fdg. 43).

Since 1945 the percentage of yearly total standard coupler business done by each of the appellee manufacturers has varied widely (Jur. Stmt., App. A, 36), with the smaller non-patent owning manufacturers having consistently increased their business at the expense of the large patent

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[4] Appellant's Jurisdictional Statement refers repeatedly to "the standard coupler," apparently in an endeavor to create the impression that the same coupler has been standard from 1916 to date. In fact, increased service requirements have necessitated continuous improvements in standard coupler design. Since 1916, four different coupler designs have been adopted by the railroads as standard or alternate standard. (Fdgs. 6, 40).

owning manufacturers (Jur. Stmt., App. A, 62). And this has occurred notwithstanding the fact that since 1945 each appellee manufacturer "has had surplus and unused capacity for the production of standard couplers and standard coupler parts" (Fdg. 70). "Each [of the appellee manufacturers] fights for every customer and every sale . . . the industry is one of ceaseless competition." (Jur. Stmt., App. A, 40-41).

This competition prevails in an industry with limited prospects (Jur. Stmt. App. A, 41):

> "To increase one's business in this industry does not mean one creates business which did not exist before. It means you must take it away from somebody else. There is only 100 percent of the business and it is limited to railroads only, and no salesman creates any new prospects. Sales ability constructs no new railroads. You have to fight for what there is."

In such a vigorously competitive market the prices of an identical product to a limited number of "customers represented by astute purchasing agents" (Jur. Stmt. App. A, 41) had to be uniform:

> "Mr. Suttie of American Steel Foundries said he had to follow National's prices because the parts were all to exactly the same specifications and of the same standard quality so that no railroad would pay any other price for the same identical thing. The only difference was the imprint, the name plate on the parts." (Jur. Stmt., App. A. 46)

Appellee National Malleable was the largest manufacturer of standard couplers, and no other manufacturer could make the coupler "any cheaper". (Jur. Stmt. App. A, 44). The Trial Judge recognized the obvious business dictate that the smaller companies "couldn't charge more for the same exact thing and get the business at all; that

they couldn't charge less and get the business because National would have to meet their competition if they did so." (Jur. Stmt., App. A, 43).

And the customers constitute ". . . an industry which is in a condition of contraction." (Jur. Stmt., App. A, 55). As established by appellant's own evidence, the number of all freight-carrying cars decreased by over 54,000 cars in the five-year period between 1951 and 1955 alone. (Pltf's. Exh. 1200-1827).

As the Trial Judge observed, the coupler industry today does not have (Jur. Stmt., App. A, 56):

> ". . . what it takes to entice new venture capital to risk itself, because it cannot either profit or expand and its future is comparatively dismal alongside of the investment opportunities in the ventures which entice America today, such as in the electronic and nuclear fields . . . As a matter of circumstantial evidence it is far more probable that venture capital stays out of this business because it doesn't want to get in rather than it is kept out by unlawful combination. I find that nobody of the industry here decided to keep anybody out. The ones on the outside never evidenced any desire to get in . . . The reason why they wouldn't are very apparent and those reasons are not the result of any illegality."

Under such conditions appellant was unable to point to "anybody in particular who" within the last twenty years "desired to actually get into this business and who had the competency to get in the business, who was kept out." (Jur. Stmt., App. A, 53)

It was a record such as this which compelled the Trial Judge to reject the inferences of illegality sought by appellant and, in the exercise of his discretion, to refuse to issue the injunctive relief prayed for by appellant.

ARGUMENT

I.

IN THE ABSENCE OF A STRONG SHOWING OF ABUSE OF DISCRETION THE TRIAL COURT'S REFUSAL TO EXERCISE ITS EQUITY POWERS TO GRANT INJUNCTIVE RELIEF SHOULD BE AFFIRMED.

This Court, in *United States v. W. T. Grant Co.*, 345 U. S. 629, 633, unequivocally stated the rule applicable here:

> "The purpose of an injunction is to prevent future violations, *Swift & Co. v. United States*, 276 U. S. 311, 326 (1928), and, of course, it can be utilized even without a showing of past wrongs. *But the moving party must satisfy the court that relief is needed.* The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. *The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it.* To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations."

Moreover, ". . . the Government must demonstrate that there was no reasonable basis for the District Judge's decision." (345 U. S. at 634).

It is not enough for appellant here to urge that different inferences might have been made by the trier of the facts. As this Court declared in *United States v. Yellow Cab Co.*, 338 U. S. 338, 341-2:

> *"Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.* If defendants' witnesses spoke the truth, the findings

are admittedly justified. *The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.*

"It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. *There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial de novo on the record of such findings as intent, motive and design.* While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous'."

To the same effect are *Hecht Company v. Bowles,* 321 U. S. 321, 329; *United States v. Oregon State Medical Society,* 343 U. S. 326, 333.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE INFERENCE OF AN INTENT TO MONOPOLIZE BY APPELLEE MANUFACTURERS, URGED BY APPELLANT UPON CIRCUMSTANTIAL EVIDENCE ALONE.

Appellant's first alleged "substantial" question (Jur. Stmt., 16, 17) relates to alleged monopolization of standard couplers and parts since 1945. Appellant recognizes that to establish its case it had to prove that *presently* the appellees had "both the power to monopolize, and the intent to monopolize." (Jur. Stmt., 17; *American Tobacco Co. v. United States,* 328 U. S. 781, 811). In attacking the Trial

Judge's decision, appellant has confined its Jurisdictional Statement principally to attempting to show the *"power"* of appellees to monopolize, based on the Standard Coupler Agreement of 1916, ownership by two of the appellees of patents relating to standard couplers, and control of standard coupler drawings and gauges. In so doing, appellant endeavors to gloss over the Trial Judge's determination, predicated upon the *subjective* issue of the general *intent* of the appellee manufacturers, that there was no present threat of monopolization requiring injunctive relief.

A. THE TRIAL COURT PROPERLY CONSIDERED THAT, SINCE THIS WAS AN ACTION FOR INJUNCTIVE RELIEF, IT WAS INCUMBENT UPON APPELLANT TO ESTABLISH THAT THERE WAS A PRESENTLY EXISTING VIOLATION OF LAW BY APPELLEES WHICH, IF NOT RESTRAINED BY INJUNCTION, WOULD CONTINUE.

Appellant devotes considerable of its Jurisdictional Statement to a description of the terms and operations of the so-called Standard Coupler Agreement of 1916 which, however, was admittedly terminated as of December 31, 1944.

The Trial Judge gave consideration to the some thirty years of history that preceded the cancellation of the Standard Coupler Agreement of 1916. He recognized, however, that the issue before him was immediate, and that the equitable relief requested by the appellant should not be granted unless necessary to forestall present or probable future violations (Jur. Stmt., App. A, 31-2, 66):

> "Since this is an injunction case, we might well have limited the evidence to that which has happened since December of 1944, because a 13-year period ought to have been sufficient to prove a current conspiracy, if one exists, but we have permitted the plaintiff to go back beyond the Trust Agreement of 1916 which was dissolved in December, 1944, and into some events of decades previous to that, for the purposes of showing plaintiff's claims as to the motivations, alleged illegali-

ties, the intentions with which certain wrongs were done, habit patterns, etc., all with a view to throwing light on the current situation which plaintiff claims is here susceptible of injunction and concerning which plaintiff claims that the people of these United States cannot be otherwise protected from this 40- to 60-year-old illegal combination.

* * *

"If there has been violation in the past, and I am really not called upon to find there has or has not been up to 1945, there is surely no cognizable danger of its recurrence today, thirteen years thereafter. Whether or not there has been a violation in the past, my question here is as to whether or not injunction is required today to forestall future violations."

The termination of the Standard Coupler Agreement of 1916 in 1945 resulted, as the Trial Judge found (Fdg. 42), in "*substantial changes which have continued to the present time* in the method by which each of the defendant manufacturers conducted its business" including six specific changes, i.e. (1) no business quotas have been allocated; (2) there has been no fixing of prices; (3) there has been no agreement or understanding among the defendant manufacturers with respect to the issuance of licenses under patents covering features embodied in the standard coupler; (4) there has been no agreement or understanding among any of the defendant manufacturers to allocate customers; (5) competition among them to obtain the maximum possible business has resulted in "a veritable cat and dog fight, wherein each has tried to get all the business away from the others that it can"; and (6) the smaller coupler manufacturers have consistently increased their business at the expense of the larger manufacturers.

In denying relief the Trial Judge was, of course, heeding the admonition of this Court in *United States v. Oregon State Medical Society*, 343 U. S. 326, 333:

> "It will simplify consideration of such cases as this to keep in sight the target at which relief is aimed. *The sole function of an action for injunction is to forestall future violations.* • • • All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur. • • • Even where relief is mandatory in form, it is to undo existing conditions, because otherwise they are likely to continue."

Appellant recognizes that in this case proof of any *present intent* to monopolize by the appellee manufacturers must be established by inference only. Appellant offered no direct evidence of such intent, or of such monopolization. It was primarily from "The fact that no newcomer has entered the industry during a 40-year period . . ." (Jur. Stmt. 17; App. A, 53) that appellant asked the Trial Court to *infer a present intent* to monopolize by the appellee manufacturers.

The Trial Judge not only decided that this was not a valid inference to be drawn from the evidence, but also concluded that the evidence affirmatively established a lack of intent to monopolize on the part of the appellee manufacturers. In arriving at this conclusion, he considered the evidence, which appellant would have this Court ignore, of (1) the lack of any real applicants, since 1945, for entry into the coupler industry, and the declining market for railroad couplers; (2) the intense competition among the present coupler manufacturers, including the non-patent owning smaller manufacturers; and (3) the statements of the responsible officials of the patent-owning appellees of their willingness to give consideration to any qualified applicant for a license to manufacture standard couplers.

B. APPELLANT WAS UNABLE TO SHOW ANY REAL APPLICANTS SINCE 1945 FOR ENTRY INTO THE COUPLER INDUSTRY, AND THE TRIAL COURT ACCEPTED, AS A MORE REASONABLE EXPLANATION OF THE LACK OF ANY NEW COMPETITION IN THE INDUSTRY, THE CONTRACTING AND DECLINING NATURE OF THE RAILROAD SUPPLY BUSINESS, RATHER THAN THE MONOPOLY CONSPIRACY INFERENCE ASSERTED BY APPELLANT.

The District Judge examined (Jur. Stmt. App. A, 53-54) appellant's contention that there were "real applicants" for entry into the standard coupler industry, and found the evidence to be to the contrary. One applicant had no intention to get in "and so stated"; another was looking for an "angel"; the third said "they were only 'toying' with the idea", and "never asked for a license"; and the last was told how to get information it requested, but "was never heard from again".

Moreover, there is nothing in the record to support the assertion made by appellant (Jur. Stmt. 3) that the Mechanical Committee "had jointly withheld from others data as to the size, dimensions, and tolerances requisite for manufacture of the standard coupler and its parts. . ." Appellant was unable to show any instance in the last ten years in which any person or manufacturer, interested in standard coupler manufacture, had even requested that drawings be supplied (Fdg. 76). And furthermore, the Trial Judge found (Fdg. 36) that supervision over distribution of standard coupler drawings is required for public safety.

The Trial Judge's common sense analysis bears repetition here (Jur. Stmt. App. A, 47, 48):

> "As to the Mechanical Committee's holding its own drawings and gages and the claim of their denying others access thereto, I do believe that whatever was done in this respect was done in the interest of standardization and in the interest of protecting standardization and in the interest of the safety of passengers and crews on trains.

"I agree that standardization is necessary to prevent the manufacture of obsolete or inadequate parts which would endanger those who ride and those who work that others may ride.

• • •

"Just what must manufacturers do to keep within the law? Must they go around with their drawings in their hand offering them to those who might possibly be enticed into becoming their competitors? Is it wrong to create something and to possess it and to wait for someone who did none of the work to ask for it? And if you want something that belongs to somebody else, because he put it all together, and you didn't put any of it together, were we not told long ago to 'ask and we shall receive'? And whether one's hat is in his hand or not, it seems to me it is more just to tell one man to go through the red tape of speaking up for himself than it is to make a criminal out of one who didn't give up his possession because a prospective manufacturer who doesn't yet exist—according to the testimony in the case to date—has coveted his neighbor's goods and is willing to take them but is not willing to go through the indignity of asking for them."

Recognizing appellant's claim to be that "since no new competitors have come into the business . . . they have therefore been kept out," (Jur. Stmt. App. A, 53), the Trial Judge refused to accept such an unsupported inference, and pointed to the unchallenged economic fact, that "the railroads are in an industry which is in a condition of contraction . . . it is equally a matter of common knowledge that capital of the size required here seeks to enter businesses which have a fair chance to both profit and expand . . . I do believe that no part of the railroad business today has what it takes to entice new venture capital to risk itself, because it cannot either profit or expand and

its future is comparatively dismal . . ." (Jur. Stmt. App. A, 55-56).

The Trial Judge found, based on the uncontroverted evidence, that "to equip a foundry, already established and equipped to produce steel castings, to produce only the standard types E, H and F couplers and parts therefor would cost in excess of Nine Hundred Thousand Dollars" (Fdg. 72); and that since January 1, 1945 no manufacturer other than the defendants, "after investigation of the business has sought to invest venture capital to manufacture and sell standard couplers or standard coupler parts, *and because of the economic factors prevailing in the business there is no probability that any new manufacturer will desire so to do in the future*" (Fdg. 73).

"The fact that since January 1, 1945, no manufacturer other than defendant manufacturers has entered the business of manufacturing standard couplers or standard coupler parts in the United States has resulted from economic forces beyond the control of defendant manufacturers, and not from their conduct either before or after January 1, 1945" (Fdg. 78).

On this proof, that the industry was in a "condition of contraction" so that "venture capital would be too intelligent to get in," the Trial Court concluded that "Plaintiff here says others are improperly kept out of this business. The defendants have proved nobody wants in." (Jur. Stmt. App. A, 55).

C. THE UNCONTROVERTED EVIDENCE ESTABLISHED THE INTENSE COMPETITION EXISTING IN THE RAILROAD COUPLER INDUSTRY TODAY AND THE ABSENCE OF ANY ECONOMIC SANCTIONS BY THE LARGER PATENT OWNING COMPANIES AGAINST THEIR SMALLER NON-PATENT OWNING COMPETITORS.

Of special significance to the Trial Judge in determining whether or not the appellee manufacturers had any intent to monopolize was the uncontroverted evidence of the

intense competition among these manufacturers of railroad couplers. In the District Judge's own language (Jur. Stmt. App. A, 36-8):

> " . . . in 1948 National had 42½ percent of all business in E couplers, new equipment, repair and maintenance sales, and in June, 1957, they were down to 35 percent of all business. This is a terrific drop because that 7½ percent loss of the total of all business done by all constitutes a reduction in National's own business of a little more than a 19 percent loss of National's own business. And Symington-Gould and American Steel Foundries gained nearly all of National's loss.
>
> . . .
>
> "Every defendant is out to get all the business he can get. They have all so sworn, and the mathematical certainties prove it."

Appellee Buckeye, prior to 1944, sold only 13.41 per cent of coupler knuckles, but by 1957 it was selling 42.5 per cent. (Jur. Stmt. App. A, 36.)

Equally persuasive to the Trial Judge in determining whether the appellee manufacturers had any present or future intent to monopolize so as to justify equitable relief was the fact that the smaller of the appellee manufacturers, holding no patents on the standard E freight car coupler, had nevertheless vigorously competed since 1945 and had expanded their businesses at the expense of the larger patent-owning appellees, without any economic pressure and without any threat of a refusal to have their licenses renewed.

As an example, the Court referred to the situation of the appellee Buckeye Steel Castings Co. (Jur. Stmt. App. A, 60-1):

> "We find that Buckeye holds no patent here whatsoever. It operates on licenses from someone else to

make what they have patented. The royalties are so nominal that a non-owner is at no disadvantage whatsoever. Royalties are never equal to one-half of one percent of the selling price, so the owners have taken no advantage whatsoever of the non-owners.

"The Government has here suggested that the method followed in the renewal of licenses is a factor of what they consider a conspiracy herein. The success of Buckeye since 1945 disproves the claim. Holding no patents, operating on licenses from others, receiving them without asking for them as they have testified, they give the patent owners the biggest competitive headache they get."

Indeed, as showing the intensely competitive atmosphere in this industry, the Court singled out exhibits showing the increase in customers of appellee Buckeye (Jur. Stmt. App. A, 40):

"Buckeye's Exhibit 383 shows that after the 1944 dissolution Buckeye went out and gained 138 new customers and, at the same time, lost 37 of their old customers. Therefore they have a net gain of 101 customers when there were only 270 possible customers to solicit. In other words, they got more than one-third of all customers from all sources, which were also sources for the other defendants. This proves the fallacy of the claim that there is no competition here."

" . . . little Symington-Gould had 18.23 percent of all coupler business in 1954, and ASF, a big one [and one of the two appellees owning patents on the standard E coupler] had 16.59." (Jur. Stmt. App. A, 62)

Appellee McConway & Torley, another small, non-patent owner, which had only 10% of the market before 1945, had "in the following years immediately thereafter, 16 percent, 12.51, 13.78, 13.89, 15.94, and so on." (Jur. Stmt. App. A, 35)

D. THE RESPONSIBLE OFFICIALS OF APPELLEES OWNING PATENTS ON FEATURES OF THE STANDARD RAILROAD COUPLER STATED THEIR WILLINGNESS TO GIVE CONSIDERATION TO ANY QUALIFIED APPLICANT FOR A LICENSE.

Appellant recognizes that appellee National Malleable's Vice-President in charge of issuing patent licenses "testified that there was no agreement which prevented him from issuing licenses to any qualified applicant (Tr. 1923), and that it was his company's policy to give 'serious consideration' to any license application from any qualified applicant." (Jur. Stmt., 14). There was similar testimony by a Vice-President of appellee American Steel Foundries, the only other appellee owning patents on the present standard E freight coupler (Tr. 1332-1334).

Appellant's only criticism of this testimony and of the Trial Court's acceptance of it is that no witness testified that "any defendant would license every qualified applicant." (Jur. Stmt., 14).

A charge of abuse of discretion on the part of a Federal Judge cannot be predicated upon such language refinements. The Trial Judge accepted this testimony as evidencing a "licensing policy . . . fair to all" (Jur. Stmt., App. A, 53) in view of appellant's failure to show a single instance in over twenty years in which any serious applicant for a license had been refused, and in view of the evidence that existing manufacturers without patents had successfully, without any economic reprisals, obtained increasingly more business than the larger manufacturers owning patents, and in an industry that was contracting, not expanding.

E. THE TRIAL COURT PROPERLY RULED THAT NO INFERENCE OF PRESENT INTENT TO MONOPOLIZE BY THE APPELLEE MANUFACTURERS COULD BE PREDICATED ON THE STANDARD COUPLER AGREEMENT OF 1916, TERMINATED IN 1945.

Ignoring the current situation in the railroad coupler industry, appellant devotes considerable of its Jurisdictional

Statement to the so-called Standard Coupler Agreement of 1916, admittedly terminated as of December 31, 1944. Appellant characterizes this agreement as a licensing of "pooled patents", and contends that the Trial Court "plainly erred" in finding that this agreement "did not unreasonably restrain or monopolize trade or commerce, and the licenses issued pursuant to such agreement constituted valid and legal exercise of patent rights." (Jur. Stmt. 16).

The Trial Judge considered that he was "really not called upon to find there has or has not been up to 1945" any violation of the Sherman Antitrust Act (Jur. Stmt. App. A, 66). Nevertheless, since appellant had urged so insistently that the Standard Coupler Agreement of 1916 was illegal, the Trial Judge considered this issue and concluded that, "As to the Trust Agreement of 1916, as of the date it was made I see no illegality in it then, and since 1945 no court has ever found it to be illegal. Nor do I." (Jur. Stmt. App. A, 32).

Appellant's assertion of the illegality of the 1916 Agreement overlooks two controlling factors, which distinguish the Standard Coupler Agreement from the "patent pooling" arrangements condemned in the authorities relied on by appellant (Jur. Stmt. 16). These factors, which were clearly before the Trial Judge, and on which his finding that the 1916 agreement "did not unreasonably restrain or monopolize trade or commerce" (Fdg. 25) is based, are:

(1) The concededly chaotic situation (Jur. Stmt. 6-7) in which the railroads and the coupler industry found themselves in the early 1900's, and the remedial effect of the adoption of the standard D coupler, hailed as "epoch-making" by the Interstate Commerce Commission in 1916 (Fdgs. 15, 19 and 20);

(2) The limitation of the interchange of patent rights provided for in the Standard Coupler Agreement of 1916

to what was necessary to eliminate the "great diversity of couplers . . . which endangered train operation and operating crews" (Jur. Stmt. 7), and to assure the development and continuity of standard couplers. The 1916 standard D coupler embodied features covered by thirteen patents, owned by three of the then existing coupler manufacturers. Without rights under all of these complementary patents the D coupler could not be manufactured free from claims of infringement (Fdg. 23). The patent owners granted to the Board of Trustees rights under *only* those patents covering features which became embodied in the couplers adopted as standard, and furthermore, such rights, and the licenses granted by the Board, were limited to "utilization in said standard form of coupler, but not otherwise."

As stated by the Trial Judge (Jur. Stmt. App. A, 33):

> "What these manufacturers did before 1916 was unique in the history of patents and inventions. For the benefit of the entire country they so gave up their exclusive rights for the use of each other as to make it possible for the development of their ultimate mechanical masterpiece.
>
> "If they didn't have this team-work for the benefit of our people, they might still be fighting over patent differences, and we might never have perfected a standard interchangeable coupler."

Counsel for appellee National Malleable and for appellee American Steel Foundries advised their clients to enter into the 1916 agreement, because ". . . this coupler situation is one which makes the standard coupler agreement a peculiarly reasonable one," (Joint Memorandum by Charles Neave and C. C. Linthicum, Deft. N.M. Exh. 98, p. 5).

An important industry conducted business in this country under the 1916 agreement for thirty years, without challenge by the United States. The earliest of the authorities relied on by appellant (Jur. Stmt. 16) to condemn the Standard Coupler Agreement is the 1948 decision of this Court in *United States v. Line Material Co.*, 333 U.S. 287, handed down three years after the Standard Coupler Agreement was cancelled. Each of the authorities relied on by appellant is distinguishable from the Standard Coupler situation, and, furthermore, reliance by appellant on them emphasizes the sound judgment which dictated the cancellation of the 1916 agreement in 1945, prior to any of these decisions, "as a result of growing apprehension on the part of the defendant manufacturers and their counsel with respect to interpretation of the antitrust laws." (Fdg. 41).

As the Trial Judge pointed out, the legality of the 1916 agreement is, however, in no sense controlling here. Appellant in effect concedes this when it says that the "basic question presented by the appeal" is "whether the defendants abandoned" those allegedly illegal practices when, in 1945, "they formally abrogated the 1916 agreement." (Jur. Stmt. 16).

The drastic changes in the railroad coupler industry following 1944, considered by the Trial Judge as a complete abandonment of any prior practices, have already been discussed above. On this record the Trial Judge's conclusion, in determining whether or not to exercise his "Chancellor's discretion" to issue an injunction, that "I see no such monopoly going on today. I see no cognizable danger of recurrent violation here" (Jur. Stmt., App. A, 66), cannot be seriously attacked as an abuse of that discretion.

III

IN THE LIGHT OF THE UNCONTROVERTED ORAL TESTIMONY OF THE RESPONSIBLE OFFICERS OF EACH OF THE APPELLEE MANUFACTURERS THAT THERE IS NO AGREEMENT OR CONSPIRACY TO FIX PRICES, THE TRIAL COURT'S REFUSAL TO ADOPT THE INFERENCE OF PRICE FIXING URGED BY APPELLANT FROM MERE UNIFORMITY OF PRICES AND PRICE LEADERSHIP IN AN INDUSTRY MANUFACTURING AND SELLING AN IDENTICAL PRODUCT TO A LIMITED NUMBER OF CUSTOMERS IS NOT AN ABUSE OF DISCRETION.

Appellant's second alleged "substantial" question (Jur. Stmt. 18, 19) relates to an alleged price fixing conspiracy by appellee manufacturers. It has predicated its appeal, as it did its presentation in the lower court, on an inference of illegality arising from price uniformity, allegedly continuing after the cancellation in 1945 of the standard coupler agreement of 1916. Price fixing by agreement through the Standard Coupler Agreement of 1916 and the Board of Trustees was abandoned when that agreement was cancelled in 1945. Accordingly, (contrary to appellant's contentions) there could be no continuation of "the same system of pricing", (Jur. Stmt. 4).

Appellant's real charge is that, since 1945 "The others have consistently adopted National's prices and related freight differentials." (Jur. Stmt. 18).

The Trial Judge, recognizing that National Malleable at all times since 1945, was the largest producer of standard couplers and had the ability to produce standard couplers on a lower cost basis than that of its competitors (Fdg. 49) stated the business necessity of National Malleable's competitors following its prices (Jur. Stmt., App. A, 41):

> "Buckeye's counsel says they followed National prices; that they are constrained to do so because

couplers are exactly alike and completely interchangeable and fungible. All must go to the same small group of customers represented by astute purchasing agents. They know a small company can't get more money for the same thing than a large one. They followed National's prices but couldn't learn them until they were published. Moriarty never told them until he told the world. That was the plaintiff's proof, and I believe it, and I find that the parallelism of action here which plaintiff construes as constituting proof of an implied conspiracy here is really the result of a strong and informed competition."

The other appellee manufacturers perforce followed National Malleable's prices within, as well as outside, base territory. National Malleable determined its delivered prices outside base territory by using a freight differential list. It was not difficult for competitors to determine National Malleable's delivered prices. They were often "ascertained by competing defendant manufacturers from customers" (Fdg. 56). National Malleable, therefore, acceded to requests from each of its competitors "from time to time . . . to furnish to it a copy of its freight differential currently in use . . ." (Fdg. 56).

Since general price uniformity in the selling of an identical product is inevitable, competition in the standard coupler industry has been and is conducted generally by other means. Since January 1, 1945, the terms and conditions of sale established from time to time by the defendant manufacturers "have not been uniform, but have been varied by them for competitive purposes as have sales inducements utilized by various ones of them. Defendant manufacturers from time to time have deviated from the published prices set forth in their price lists for both standard couplers and standard coupler parts and yokes to meet competitive conditions" (Fdg. 59).

The Trial Judge was called upon to balance the inferences sought by appellant against the oral testimony of the responsible officers of the appellee manufacturers, each of whom categorically denied any price fixing agreements or conspiracies. "To the sophistication and sagacity of the Trial Judge the law confides the duty of appraisal", of witnesses, *United States v. Oregon State Medical Society*, 343 U. S. 326, 339. The Trial Judge made this appraisal in no uncertain terms (Jur. Stmt., App. A, 42-5):

> "Now, there were some animate witnesses on price-fixing, too, and all animate witnesses testified there was never a conspiracy or combination here or any agreement to fix prices.
>
> "It may be ever natural for the accused to deny a charge against him; it may even accord with their instinct of self-defense. We have all observed that as lawyers. But it seems to me these were intelligent, educated, honorable professional men, these were men to whom dishonesty in a court room would be as alien as a deliberately false reading from one of their own slide rules. To me they tell a completely honest story of their businesses, and of the events with which we are here concerned.
>
> • • •
>
> "I believe the testimony of the men who said they fight for business because the business in its ups and downs, from these exhibits, proves exactly what they say.
>
> "Now Emerson once said that 'what you are talks louder than anything you can say.' Here the changing course of business, the way some take business away from others, the way sales go up and sales go down, the graphs which prove the degree of change, all of this talks louder and more convincingly to the effect that there is a healthy competition here and everybody is getting all the sales he can.

> "These facts and this evidence in exhibit form talk louder against the theory of illegal combination than do the suspicions of plaintiff's counsel or any contrary evidence which plaintiff has produced."

The Trial Court accepted the undisputed sworn testimony of the responsible officials of appellee manufacturers, that in the exercise of their own proper business judgment they followed the prices of National Malleable. This Court has specifically held that such action is *not* a violation of the Sherman Antitrust Act. Thus, it said, in *United States v. International Harvester Company*, 274 U. S. 693, 708-709:

> "And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

To the same effect are *United States v. United States Steel Corporation*, 251 U. S. 417, 448, 449; *Cement Manufacturers Protective Association v. United States*, 268 U. S. 588, 606; and *Cole v. Hughes Tool Co.*, 215 Fed. 2d 924 (10th. Cir., 1954), cert. den. 348 U. S. 927.

Appellant would have this Court ignore the oral testimony accepted by the Trial Judge, substitute appellant's inference of price fixing from circumstances so firmly rejected by the Trial Judge, and thereupon predicate an abuse of discretion. There is no authority for such a sweeping rejection of a Trial Judge's primary responsibility by an appellate court.

Appellant contends that a "substantial question" is presented on the facts of this case which requires distinguishing between principles applied by this Court in *United States v. Masonite Corp.*, 316 U. S. 265, and *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, on the one hand, and those found controlling in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537,

on the other, as a guide in administration and enforcement of the Sherman Act. *Masonite*, as quoted by appellant, was a case of the " 'fixing of prices by one member of a group, pursuant to *express* delegation, acquiescence or understanding . . .' " (Jur. Stmt., 18-19), as was *Interstate Circuit*, 306 U. S. 208, 216.

This is not, however, the case appellant presented to the Trial Court. There it conceded in its closing arguments to the Court that, because "the other defendants were consistently following National as price leader . . . the plaintiff contends that this as a matter of law *implies* an agreement to follow National's price. . ." (Tr. 2568). Appellant's counsel conceded that "there was no *expressed* agreement" (Tr. 2571) by any of the appellee manufacturers to follow National's price leadership, and recognized that "the plaintiff must admit there was no direct evidence in this case that National advised any other defendant what they were going to do about prices" (Tr. 2574).

Both *Masonite* and *Interstate Circuit* involved formal "invitations" to competitors to follow the pricing policy of the inviter, individually accepted in fact by such competitors, with knowledge of the acceptance by all others. The necessary announcement of prices to the trade, even when followed by others, cannot be considered any such "invitation" to an illegal conspiracy.

In *Theatre Enterprises*, on the other hand, the court held that mere common knowledge of each defendant that all were following the same business practice did not establish a conspiracy. There the Court stated (346 U. S. at p. 541):

> ". . . this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."

There is no evidence in the record of the "tacit delegation", whatever that means, which appellant claims the

other manufacturers made to National Malleable of the duty of fixing prices to be blindly followed. Appellant apparently tries to fill this gap by its reference to an isolated instance when "National did considerable prior missionary work with customers and competitors prior to shifting, late in 1947, from quotation of firm prices to 'prices in effect at time of delivery' (fngs. 62-63)." (Jur. Stmt. p. 12).[5] The Trial Court found that the expressions of opinion by National Malleable's vice-president here referred to "did not constitute a request or an invitation to competitors to participate in or give adherence to any plan, understanding, agreement or program for the establishing or maintenance of prices on standard couplers" (Fdg. 63). In fact, although National Malleable's competitors independently (Fdg. 64) followed and adopted the "policy of pricing couplers at prices in effect at the time of delivery" in 1947 (Fdg. 62) National Malleable was later forced by competitive conditions to return to the system of quoting prices firm at time of order or sale (Deft. N. M. Exhs. 273, 274, 275).

This case, therefore, does not lie between *Masonite* and *Interstate Circuit* and *Theatre Enterprises*, as appellant contends, but instead is squarely within *Theatre Enterprises*. Accordingly, a decision in this case would not delineate between the two principles of those cases.

CONCLUSION

There is here no substantial legal question whatever of public importance essential to proper administration of the antitrust laws, but simply appellant's final effort to secure further review of a lengthy trial record of cumbersome size

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[5] Examination of these findings demonstrates that appellant's implication, from the term "missionary work", that the District Court found that National Malleable issued an "invitation" to the other defendant manufacturers to participate in a changed pricing plan misstates the findings.

and scope. The decision below is correct, and this appeal presents no question which requires further briefing or argument.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX I

In the United States District Court for the Northern District of Ohio, Eastern Division

Civil Action No. 30281

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY, AMERICAN STEEL FOUNDRIES, THE BUCKEYE STEEL CASTINGS COMPANY, THE SYMINGTON-GOULD CORPORATION, MCCONWAY & TORLEY CORPORATION, FOUNDRIES EXPORT CO., INC., AND ASSOCIATION OF AMERICAN RAILROADS, DEFENDANTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, pursuant to Rule 52 of the Federal Rules of Civil Procedure, hereby finds the facts specially and states separately its conclusions of law herein as follows:

FINDINGS OF FACT

1. This is a suit under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, commonly known as the Sherman Act, to prevent and restrain alleged continuing violations of Sections 1 and 2 of that Act (15 U. S. C. Secs. 1, 2 and 4).

2. The defendants, National Malleable and Steel Castings Company, (hereinafter called "National Malleable"); American Steel Foundries, (hereinafter called "American"); The Buckeye Steel Castings Company, (hereinafter called "Buckeye"); McConway & Torley Corporation, (hereinafter called "McConway"), and The Symington-Gould Corporation, (hereinafter referred to collectively as the "defendant manufacturers"), have been engaged in the business of manufacturing railroad couplers and yokes

since some time before the year 1912. The defendant The Symington-Gould Corporation, (hereinafter called "S-G"), was formed October 28, 1936, by the merger of The Symington Company and The Gould Coupler Company, (hereinafter referred to as "Gould"). The Symington Company was not a manufacturer of railroad couplers, but Gould had been a manufacturer of such couplers from some time prior to 1912 until the time of the merger. Since the merger of The Symington Company and Gould, S-G has continuously been engaged in the manufacture of railroad couplers.

3. The Association of American Railroads (hereinafter called the "AAR") is a voluntary unincorporated association of the principal railroads of the United States, Canada and Mexico, with its principal office in Washington, D. C. It was formed on October 12, 1934 as successor to the American Railway Association, which was established following reorganization of the American Railroad Association (after October 1, 1920). The latter in turn was organized in 1919 under authority of a directive of the United States Railroad Administration, during the World War I period of Government operation. The Mechanical Division of American Railway Association and its predecessor had resulted from contemporaneous amalgamation of the American Railway Master Mechanics' Association and the Master Car Builders Association (herein called the "MCB"). To facilitate the free interchange of cars among different railroads and the repair of such cars, the MCB had from 1867 until 1918 promulgated standards of car construction. Neither AAR nor any predecessor of AAR has manufactured or sold couplers or coupler parts. Individual railroads which are members of AAR purchase couplers and parts for use on cars which they own and for repair or replacement on cars operated over their lines but owned by others.

4. One of the six departments of AAR is the Operations and Maintenance Department, the head of which is a Vice President of AAR. One of the six divisions in that department is the Mechanical Division. The Mechanical Division serves the mechanical departments of AAR member roads in matters of general interest to the member roads. The activities of the Mechanical Division are carried on through committees under the general supervision of the General Committee of the Mechanical Division. There are approximately twenty-one subordinate committees. One of those committees is the Committee on Couplers and Draft Gears. The members of the Committee on Couplers and Draft Gears are appointed by the General Committee and consist exclusively of mechanical officers of various member roads. A staff of employees of AAR perform administrative work for the committees of the Mechanical Division, but no employee of AAR is or has been a member of the General Committee or of the Committee on Couplers and Draft Gears or has had any right to vote on matters considered by those committees.

5. One of the functions of the Mechanical Division is and has been the adoption of various standards (including alternate standards) for railroad car construction and for the numerous component parts of railroad cars, including couplers and yokes. Those standards are known and usually referred to in the railroad industry as AAR standards.

6. The railroad car couplers involved in this case are devices attached at each end of a railroad car or of a railroad locomotive for the purpose of connecting or coupling cars with one another and cars with locomotives. The couplers here involved are so-called knuckle type couplers, and the standard and alternate standard couplers are made up of the following basic parts: coupler body, including head and shank, knuckle, lock, knuckle thrower, lock lift assembly and knuckle pin. Standard and alternate standard couplers are those couplers adopted as such from

time to time by the member railroads of the AAR or its predecessors.

7. A "yoke" is a steel casting to which the shank of the coupler is connected. The yoke is supported on the underframe of a railway car or locomotive and surrounds the shock-absorbing mechanism usually called a draft gear. There are at least ten manufacturers, including the five defendant manufacturers, of the Y-40 yoke, generally used with the D and E couplers, the principal freight car couplers. The defendant manufacturers are the only manufacturers of swivel yokes and yokes designed for use with the standard F and H couplers.

8. The design and specifications of standard couplers and yokes and proposed improvements or changes therein are considered by the Committee on Couplers and Draft Gears, and, after testing has been completed to the satisfaction of that Committee, recommendation is made by it to the Mechanical Division at its annual meeting, where the recommendation is open for discussion by the membership as a whole. A vote is then taken as to whether the recommendation should be submitted to the membership in the form of a Letter Ballot. When such a ballot is taken, member roads voting in the negative are requested to state the reasons for such vote, for the further guidance of the committee or committees affected. Adoption of such recommendations requires a majority vote based on car ownership. Such Letter Ballot procedure is followed not only with respect to the adoption of distinct types of couplers as standard, but also with respect to modifications to any standard type except that modifications deemed by the AAR Committee on Couplers and Draft Gears to be of a minor or editorial nature are as a matter of practice sometimes approved by the AAR Committee on Couplers and Draft Gears without submission to Letter Ballot.

9. Each railroad has the independent right to purchase and use any kind of couplers or coupler parts that it may

desire, regardless of whether such articles meet or do not meet the AAR standards, subject only to the safety requirements of laws of the United States and of the several states.

10. In actual practice, member roads of the AAR have exercised their right of individual choice by purchasing and using from time to time articles of car construction different from standards of AAR and its predecessors, including non-standard couplers and coupler parts. There has been and is no agreement or understanding between the AAR or its predecessors and the defendant manufacturers, or between the AAR or its predecessors and member roads either (a) that member roads will purchase and use only standard couplers and parts or (b) that member roads will not purchase or use couplers or coupler parts manufactured by persons or corporations other than the defendant manufacturers.

11. Railroads and non-railroad owners of freight and passenger cars, including certain departments and agencies of the United States of America, have entered into an Interchange Agreement by which they subscribe to Interchange Rules adopted by the member railroads and promulgated by the AAR. The Interchange Rules provide for the inspection, maintenance and repair of cars operated over the line of a railroad which does not own those cars. The Interchange Rules require connecting carriers to accept cars tendered in interchange if equipped as provided in the rules. Cars equipped with non-standard couplers may be refused in interchange, but refusal is not required.

12. Many railroads, members of AAR and its predecessors, have interchanged cars with equipment of various kinds differing from the equipment specified in the Interchange Rules, including non-standard couplers and non-standard parts.

13. Most passenger cars and substantial numbers of freight cars are operated only over the lines of their owners. They are not interchanged and therefore are not sub-

ject to the Interchange Rules, but most passenger cars and virtually all freight cars are nevertheless equipped with standard couplers.

14. As a result of the losses of life and limb suffered by railroad employees, due to the service inadequacy and multiplicity of designs of railroad couplers, Congress, in The Safety Appliance Act of 1893, forbade any railroad after January 1, 1898 to use in interstate commerce any car not equipped "with couplers, coupling automatically by impact and which can be uncoupled without the necessity of the men going between the ends of the cars". (27 Stat. 531, 45 U. S. C. 2.)

15. Even after the adoption of tne Safety Appliance Act of 1893, cars used on American railroads continued to be equipped with a great diversity of couplers which, though they met the technical requirements of the Statute, were deemed by the railroads themselves unsatisfactory to meet their overall operating requirements for the reasons, among others, that:

(a) The couplers differed in strength, operating characteristics, numbers and location of parts, methods and plans of construction, and service performance;

(b) Maintenance of cars so as to permit their free interchange from one railroad to another required the railroads to maintain large inventories of repair parts applicable to each of the many different types of couplers then in service; and

(c) Diversity of coupler types frequently resulted in improper installation of parts, with consequent danger to train operation and the men responsible therefor.

16. In 1904 the MCB first considered ways and means of adopting a standard coupler. In 1912 a special committee appointed by the MCB requested all of the then existing coupler manufacturers, namely, American, National Malleable, Buckeye, Gould, McConway and Monarch Steel

Castings Company (which later went out of existence, and whose assets were acquired by National Malleable in 1920) to participate with the MCB Committee in developing a standard coupler.

17. In response to the request of the railroads made through the MCB, the coupler manufacturers acknowledged the desirability, from a railroad operating standpoint, of coupler standardization, and expressed a willingness to cooperate in achieving standardization if some reasonable plan could be developed by them which would fairly protect their business rights.

18. Experimental couplers were submitted in 1912 and 1913 by the coupler manufacturers to the Standing Committee on Couplers and Draft Equipment of the MCB for its consideration as possible standard couplers. Following extensive tests of such couplers conducted under the supervision of that Committee, the "D" coupler was adopted in 1916 as standard by Letter Ballot of the MCB.

19. The Interstate Commerce Commission recognized the desirability of standardization of couplers and kept itself informed as to progress in the development of the proposed standard coupler. The Commission's Annual Report of 1916 described the adoption of the standard coupler as "an epoch-making step."

20. The standardization of couplers has greatly reduced the number of deaths and injuries from railroad operation. It has also eliminated or minimized the need for maintaining large stocks of repair parts for couplers at various points on the lines of the railroads, thereby benefiting the public through resulting economy to the railroads. Plaintiff concedes, and the Court finds, that the standardization of couplers is necessary, desirable and beneficial.

21. Following consideration of various proposals and arrangements by the coupler manufacturers and their counsel, an agreement known as the Standard Coupler

Agreement of 1916 was executed on October 18, 1916 by National Malleable, American, Buckeye, Gould and Monarch.

22. In essence, the substantial provisions of the Standard Coupler Agreement of 1916 were as follows:

(a) A Board of Trustees was created composed of one representative of each of the parties, to which Board of Trustees each of the parties agreed to grant limited rights under all patents owned by it, covering features which should become embodied in any coupler adopted as standard by the American railroads "for utilization in said standard form of coupler but not otherwise";

(b) The Board of Trustees was authorized to grant non-exclusive licenses to manufacture and sell any coupler which should be made standard by the railroads, including parts therefor;

(c) The Board of Trustees was to specify in such licenses the prices at which the licensee would sell standard couplers and standard coupler parts which within a specified territory (known in this record as "base territory") were to be f.o.b. the coupler manufacturer's works with freight allowed, on complete couplers only, at the carload rate to the nearest point on any railroad or the plant of any car or locomotive builder located in the "base territory", and outside the specified base territory were to be on the same basis except that the f.o.b. price for complete couplers only was higher by an amount computed as required in said agreement (known in this record as a "freight differential").

(d) The Board of Trustees was to specify in such licenses the percentage of the total business, by pieces, in standard couplers, standard coupler bodies, standard coupler knuckles, and standard coupler locks which each of said licensees would

be permitted to obtain in any single year; and to decrease the percentage of any licensee which should exceed the quota so prescribed; and

(e) The quotas specified in the license agreements were to be based on the average percentage of business done by each licensee during the period from 1908 through 1912, and were to be subject to revision on the same basis in the event that additional manufacturers should be licensed.

23. The standard "D" coupler embodied features covered by thirteen United States patents owned by National Malleable, American and Monarch, and rights under all those patents were required to manufacture and sell the standard "D" coupler free from claims of patent infringement.

24. From 1917 through 1924, the Board of Trustees under the Standard Coupler Agreement granted yearly licenses to McConway to manufacture and sell Standard "D" couplers. As of December 14, 1925, McConway became a party to the Standard Coupler Agreement of 1916, and was issued the standard form of non-exclusive license by the Board of Trustees. Neither AAR nor any of its predecessors was ever a party to the Standard Coupler Agreement of 1916, or to any other agreement supplementary or amendatory thereto.

25. The defendant manufacturers in entering into the Standard Coupler Agreement of 1916 had no intent or purpose to unreasonably restrain or to monopolize trade and commerce. That agreement, and the patent license arrangements provided for therein, were reasonable arrangements to accomplish the development and manufacture of standard couplers, did not unreasonably restrain or monopolize trade and commerce, and the licenses issued pursuant to such agreement constituted valid and legal exercise of patent rights.

26. The Standard Coupler Agreement of 1916 contin-

ued in full force and effect until January 1, 1945, when it was cancelled and abrogated.

27. In accordance with the provisions of the Standard Coupler Agreement of 1916 the defendant manufacturers assigned their Canadian standard coupler patent rights to the Board of Trustees and the Board thereupon issued separate Canadian standard coupler licenses to each of the manufacturers. In turn on March 10, 1919, the manufacturers granted to Canadian Steel Foundries a sub-license to manufacture and sell standard couplers in Canada. On April 5, 1920 Canadian Steel Foundries granted a further sub-license to Dominion Foundries and Steel, also a Canadian manufacturer.

28. The quotas of busines in standard couplers and standard coupler parts allocated to each of the defendant manufacturers by the Board of Trustees under the Standard Coupler Agreement were subsequently modified. The last quota agreement was effective from December 31, 1943 until termination of the agreement as of January 1, 1945.

29. The Mechanical Committee of the Standard Coupler Manufacturers was organized in 1918 and continues in existence today. Its membership has been, and is, made up of an engineering representative of each of the defendant manufacturers.

30. The purposes, functions and activities of the Mechanical Committee have been reasonable and useful and of great benefit to the coupler industry, the railroads and the public, and its activities have not unreasonably restrained or monopolized trade and commerce. These purposes, functions and activities have included (1) the study of service requirements and service complaints, (2) the design, development and testing of improvements in existing standards and new standards of couplers and yokes, and making recommendations in connection therewith to the AAR Committee on Couplers and Draft Gears, and

(3) furnishing railroads with information regarding the operation, maintenance and reclamation of such couplers, including the development of reclamation gauges.

31. The Mechanical Committee meets at intervals of several months, and also meets jointly with the Coupler and Draft Gear Committee of the AAR twice each year. Others than representatives of the Standard Coupler Manufacturers have attended meetings of the Mechanical Committee. The joint meetings have been attended by a representative of the Bureau of Safety of the Interstate Commerce Commission.

32. The Mechanical Committee and its members have not been influenced by patent considerations in the design, development and recommendation of new standard couplers, or changes and improvements in existing standard couplers. The criterion on which the Mechanical Committee has based its recommendations to the Coupler and Draft Gear Committee of the AAR is engineering m rit, in order to develop the best possible coupler for th rail-roads. Only nineteen of the seventy-three modifications and improvements incorporated in the standard and alternate standard couplers were patented. Of the forty-nine modifications and improvements so incorporated in the past twenty-five years, only one was patented at the time of its adoption.

33. The Mechanical Committee has no authority with respect to patent matters or with respect to patent licenses. The activities of the Mechanical Committee have not been directed in any respect toward monopolizing the business in standard and alternate standard couplers and parts through the use of patents.

34. With the exception of the passenger car standard couplers, each of the standard and alternate standard couplers consists of a number of unmachined castings. Standard couplers are used in all kinds of weather conditions, and are not protected from rust or other corrosive

effects. Among the engineering problems involved in the design and development of standard couplers are space limitations, manufacturing methods and tolerances, interchangeability and non-interchangeability of parts, strength of the coupler as a whole and relative strength of the parts, simplicity of design, and increasing service requirements. A high degree of engineering skill is required in the design and development of standard couplers and improvements therein, and close engineering supervision is required to maintain the high degree of uniformity required in standard couplers.

35. To insure quality control and interchangeability among couplers and coupler parts manufactured by each of the standard coupler manufacturers, the Mechanical Committee has designed and developed gauges used in the production of standard couplers. The Mechanical Committee also conducts periodic inspections of standard couplers and standard coupler parts manufactured by the various manufacturers. This inspection includes gauging, interchanging of parts produced by the various manufacturers, and physical testing for strength.

36. The Mechanical Committee's control of drawings and gauges used in the manufacture of standard couplers and standard coupler parts is in the interest of standardization and its protection, for the preservation of the safety of passengers and crews on trains, and is necessary to prevent the manufacture of obsolete or inadequate parts which would endanger those who ride and those who work that others may ride. One set of the construction drawings of standard couplers, marked "Reproduction or distribution prohibited without authority of Chairman of Mechanical Committee" is usually furnished to AAR. Inquiries for copies of such drawings received by AAR were answered by referring the inquirer to the defendant manufacturers or their representatives. AAR had no right or authority to reproduce or distribute copies of such drawings.

37. AAR and its predecessors have not delegated to the defendant manufacturers or to the Mechanical Committee of the Standard Coupler Manufacturers any responsibilities of AAR. AAR and its predecessors from time to time have requested that a coupler or part be designed by the manufacturers to meet a particular operating need, and have requested that initial drafts of various specifications be prepared, but AAR and its predecessors have at all times reserved to themselves the decision of whether to accept, modify or reject such specifications and to accept, reject or request modifications of such designs, all subject to approval by member roads.

38. The Mechanical Committee has not persuaded, induced or caused the AAR to adopt specifications and requirements for standard couplers and parts, incorporating features claimed in patents and patent applications owned by defendant manufacturers and excluding features claimed under other patents. In all instances, the Mechanical Committee has given careful consideration to proposals and suggestions submitted by others than the defendant manufacturers with respect to changes. Following such consideration, the Mechanical Committee has based its recommendation to the AAR Committee on Couplers and Draft Gears on whether or not the changes under review would constitute an engineering improvement. The AAR Committee has given full consideration to Mechanical Committee recommendations but has always formulated its own independent judgment thereon.

39. AAR and its predecessors, in adopting standards for couplers and coupler parts, have not done so for the purpose of limiting or confining the manufacture of such articles to the defendant manufacturers or to any particular manufacturer or manufacturers or for the purpose of aiding any manufacturer or inventor in obtaining a patent thereon. Such standards have been adopted on the basis of the judgment of the members of the Committee on

Couplers and Draft Gears and the judgment of the individual member railroads as to the mechanical merit, safety and cost of such articles.

40. The service record of the standard "D" coupler was far superior to that of pre-existing knuckle-type couplers. As the speed, length of trains and size of cars increased and additional information as to service performance of the "D" coupler was obtained, the railroads, through the AAR and its predecessors, ultimately adopted as standard or alternate standard new and improved couplers for use on freight cars, known respectively as the "E", Swivel, and "F" couplers. In 1937 the first standard coupler for use exclusively on passenger cars was adopted, known as the "T" coupler. Subsequently, and after modification and improvement, a passenger car coupler, known as the "H" or Tight Lock coupler, was adopted as standard. Thereafter an additional passenger car coupler, known as the Controlled Slack coupler, was adopted as an alternate standard. From time to time modifications in these standards were adopted. The development and adoption of each additional standard or modification of existing standard were based upon sound engineering reasons.

41. As a result of growing apprehension on the part of the defendant manufacturers and their counsel with respect to interpretation of the antitrust laws, the defendant manufacturers on February 1, 1945 cancelled, as of December 31, 1944, the Standard Coupler Agreement of 1916 and other agreements amendatory thereof or supplementary thereto, including the non-exclusive licenses which had been issued by the Board to the defendant manufacturers and others for utilization of patented inventions in the standard coupler and attachments. Pursuant to such cancellation, the Board reconveyed to such of the manufacturers as were grantors the limited exclusive rights under unexpired patents previously conveyed to the Board, thereby terminating those exclusive rights. The Board of Trus-

tees was then dissolved. AAR did not learn of such cancellation by the defendant manufacturers until 1948.

42. At or about the time of the termination of the Standard Coupler Agreement of 1916 there occurred substantial changes which have continued to the present time in the method by which each of the defendant manufacturers conducted its business, including the following:

(a) There have been no business quotas allocated among the defendant manufacturers.

(b) There has been no fixing of prices for standard couplers or standard coupler parts by agreement or understanding among the defendant manufacturers or otherwise.

(c) There has been no agreement or understanding among the defendant manufacturers with respect to whether or not, or as to the terms upon which, any defendant manufacturer would issue a license under any patent owned by it and covering a feature embodied in a standard coupler, either to any of the other defendant manufacturers or to any other person or company. It has been the practice that each defendant manufacturer owning such a patent would license each other defendant manufacturer thereunder on a non-exclusive basis at a nominal royalty so that, regardless of the ownership of patents, all present manufacturers of standard couplers have been able to continue to manufacture standard couplers and standard coupler parts on a competitive basis, and non-patent owners have substantially increased the amount of their business in standard couplers and parts therefor without demand for, or threat of, increase in royalty, payment of penalty, or refusal to renew licenses.

(d) There has been no agreement or understanding among any of the defendant manufacturers to allocate customers.

(e) Competition among the defendant manufacturers to obtain the maximum possible business in standard couplers and standard coupler parts has resulted in a veritable cat and dog fight, wherein each has tried to get all the business away from the others that it can.

(f) The smaller coupler manufacturers have consistently increased their business in standard couplers and standard coupler parts at the expense of the larger manufacturers.

43. Following termination of the Standard Coupler Agreement as of December 31, 1944, licensing arrangements among the manufacturers have consisted of non-exclusive licenses granted to others by those owning patents. Such licenses have contained no quota or price restrictions. In most instances the licenses have been for the term of two years and have ordinarily been renewed for similar periods. Each of the licenses has granted rights limited to the manufacture, use and sale of standard couplers. An interchange of patent rights through such licensing arrangements is required to permit all the defendant manufacturers to produce and sell those couplers free from claims of patent infringement.

44. The licenses to Canadian manufacturers referred to in Finding 27 having been cancelled along with the Standard Coupler Agreement of 1916, as of January 1, 1945 the defendant manufacturers severally granted to Canadian Car and Foundry Company Limited, the successor to Canadian Steel Foundries, an exclusive license under the Canadian patents then and thereafter owned by the Licensors to manufacture and sell standard couplers in Canada. Provisions reflecting the requirements of the Canadian patent laws regarding revocation or invalidation of patents by reason of importation of patented articles into Canada were included in such license. The license was cancellable on six months' notice. Pursuant to the provi-

sions of such license, Canadian Car and Foundry granted a sub-license to Dominion Steel Foundries.

45. Under Canadian patent laws the defendant manufacturers who do not own Canadian patents on features embodied in standard couplers cannot manufacture standard couplers or standard coupler parts and export them into Canada without infringement of Canadian patents owned by others of the defendant manufacturers. Further, under Canadian patent laws those of the defendant manufacturers who own Canadian patents covering features embodied in standard couplers and standard coupler parts cannot export into Canada standard couplers made outside of Canada and embodying such features without endangering the validity of their Canadian patents. Canadian manufacturers of standard couplers and standard coupler parts embodying features covered by United States patents owned by any of defendant manufacturers cannot manufacture standard couplers embodying such features in Canada and export them into the United States without infringing said United States patents.

46. In connection with renewal of the post-1944 non-exclusive licenses, negotiations have been conducted among representatives of defendant manufacturers owning patents to determine the relative value of patents owned by each such manufacturer. Royalty figures contained in subsequent licenses have been based upon such relative patent values. These royalties have always been nominal in amount.

47. Following dissolution of the Board of Trustees under the Standard Coupler Agreement, the determination of whether or not to grant licenses under patents owned by any of the manufacturers for manufacture and sale of standard or alternate standard couplers, as well as the determination of the respective licensees to which such licenses have been and are to be granted, has been made by each manufacturer separately and independently.

There has been no agreement or understanding, express or implied, between or among any of the manufacturers to restrict or in any way affect or limit the manner in which any manufacturer holding patents relating to standard couplers or standard coupler parts shall exercise such patent rights, or any such agreement or understanding to exclude others from the standard coupler business.

48. Since January 1, 1945 and for many years before 1945 the market for standard couplers has been contracting, with no reasonable expectation that it will expand in the future. The total number of railroad cars in service on the railroads of the United States and Canada has continued to shrink for the last more than twenty-five years, with no indicated probable change in this trend. As a result, any increase in the business of manufacturing and selling standard couplers and standard coupler parts which is to be enjoyed by any of the defendant manufacturers must necessarily result in a comparable decrease in the business of some other or others of the defendant manufacturers.

49. At least since January 1, 1945 National Malleable has possessed the largest productive capacity for the production of standard couplers and standard coupler parts of any of the defendant manufacturers, and has at all times had the ability to produce standard couplers and standard coupler parts on a lower cost basis than that enjoyed by any of the other defendant manufacturers and at all times has been the largest producer of standard couplers and standard coupler parts.

50. Uniformity of prices in standard couplers and standard coupler parts since January 1, 1945 has resulted not from conspiracy or agreement, but from economic necessity. Since standard couplers and coupler parts of a given type are identical, no matter by whom manufactured, and are completely interchangeable, the competitors of National Malleable are unable to charge a higher price for

such products than National Malleable and obtain any business. Were National Malleable's competitors to charge less for these standard items than it charges, the result would merely be to reduce the price level, because National Malleable must meet such competition in order to obtain the business.

51. Prices charged by defendant manufacturers since January 1, 1945 for standard couplers and standard coupler parts have been established on two bases. One price has been established for standard couplers and standard coupler parts delivered in what is denominated as base territory, and a higher price has been charged for such products when delivered outside of base territory.

52. Base territory, although modified from time to time, was originally prescribed during the period of the existence of the Board of Trustees and, generally speaking, includes the east central part of the United States.

53. Since January 1, 1945 prices for complete standard couplers or standard couplers less any or all operating parts inside base territory have been f.o.b. manufacturer's plant with freight allowed at the carload rate to the nearest point on the line of road (i.e., taking lowest rate of freight) if ordered for delivery to railroads in or entering base territory, or to base territory destinations if ordered for delivery to companies other than railroads; prices for complete standard couplers, or standard couplers less any or all operating parts, outside base territory have been f.o.b. manufacturer's plant and have consisted of the price at which the same item is priced for sale inside base territory, plus the amount of a freight differential computed on a formula which approximately reflects the additional cost of transportation of the item to the destination outside of the base territory over the cost of transportation of the same item within base territory, with freight allowed at the carload rate from the manufacturer's plant to the point of delivery; prices for standard coupler parts ordered for delivery in

base territory or outside base territory have been f.o.b. manufacturer's plant with no allowance for freight.

54. Defendant manufacturers other than National Malleable have followed National Malleable's prices for standard couplers and standard coupler parts whether for delivery inside or outside of base territory. The decision of each of the other defendant manufacturers to follow the prices announced by National Malleable for standard couplers and standard coupler parts both inside and outside base territory was in each case a matter of unilateral, internal and independent action by such manufacturer and did not result from any agreement, conspiracy or understanding among the defendant manufacturers.

55. At no time has National Malleable communicated to competing defendant manufacturers information as to the changes in prices which it proposed to make until after decision as to such change had been made as a matter of unilateral, internal and independent action on its part.

56. National Malleable's prices for delivery of standard couplers and standard coupler parts outside of base territory since January 1, 1945, have been ascertained by competing defendant manufacturers from customers, and also from National Malleable. Each of the defendant manufacturers competing with National Malleable having determined unilaterally and independently to follow National Malleable's prices for deliveries outside base territory has, from time to time, requested National Malleable to furnish to it a copy of its freight differential currently in use, and National Malleable has acceded to such request. After obtaining such freight differentials, the defendant manufacturers other than National Malleable have used them for the purpose of following National Malleable's established delivered prices for standard couplers and parts outside of base territory.

57. After each defendant manufacturer has determined its prices for standard couplers, standard coupler parts and

yokes, such prices have been announced and distributed generally to the trade and the public. There has been no effort on the part of any defendant manufacturer to restrict dissemination of its established prices for standard couplers and standard coupler parts to its competitors, or to give competitors notice of changes in such prices in advance of the general distribution of such information to the trade and public.

58. As a result of the activity of their salesmen and the contact of such salesmen with railroad customers, defendant manufacturers competing with National Malleable have usually obtained information with respect to changes in National Malleable's prices from their customers before they have been able to obtain such information from National Malleable.

59. Since January 1, 1945 the terms and conditions of sale, such as the periods during which published prices will remain firm on the date by which orders must be placed to obtain a published price, established from time to time by the defendant manufacturers have not been uniform, but have been varied by them for competitive purposes as have sales inducements utilized by various ones of them. Defendant manufacturers from time to time have deviated from the published prices set forth in their price lists for both standard couplers and standard coupler parts and yokes to meet competitive conditions.

60. Since April 8, 1946, when maximum price limitations imposed by law or by OPA regulation upon the sale of standard couplers, standard coupler parts and yokes were removed, National Malleable has issued approximately thirteen price schedules for standard couplers and coupler parts. In almost all instances, the other defendant manufacturers have issued new price schedules for standard couplers and standard coupler parts shortly after issuance of the price schedule of National Malleable.

61. From January 26, 1951 to February 12, 1953 maximum prices for standard couplers and standard coupler parts were regulated by the Office of Price Stabilization, and during that period the defendant manufacturers all adhered to the maximum price levels established by the OPS.

62. In the latter part of 1947 National Malleable changed its price policy on standard couplers and standard coupler parts, stating that said products would be priced at prices prevailing at the time of delivery rather than at prices prevailing at the time of order or sale. Subsequent to National Malleable's publication of this change in pricing policy, the other defendant manufacturers followed and adopted the policy of pricing couplers at prices in effect at the time of delivery.

63. Before it publicly announced its policy to price standard couplers and standard coupler parts at prices prevailing at the time of delivery, National Malleable's Vice President Moriarty, in discussions with National Malleable's customers and competitors, stated his opinion that in the face of continually rising costs of labor and material any system of pricing other than that in effect at the time of shipment or delivery was unwise. Such discussions were not held for the purpose of obtaining any agreement or understanding among competitors with respect to prices; were not conducted pursuant to any conspiracy with respect to prices; did not constitute a request or an invitation to competitors to participate in or give adherence to any plan, understanding, agreement or program for the establishing or maintenance of prices on standard couplers or standard coupler parts; nor was it contemplated by National Malleable, or any other of defendant manufacturers, that as a result of said discussions concerted action in the establishment of prices by any of the defendant manufacturers was agreed upon or to be expected. At most Moriarty hoped that his competitors might view the economic situation as did he.

64. National Malleable's decision in 1947 to establish its prices for standard couplers and standard coupler parts as those effective at the time of shipment or delivery, and the decision of each of the other defendant manufacturers to establish similar effective dates for prices of standard couplers and standard coupler parts, were in each case made independently, internally and unilaterally, without knowledge or understanding as to the action to be taken by any other manufacturer and not as the result of any understanding, agreement or conspiracy between or among defendant manufacturers.

65. Ever since 1945 personnel of the defendant manufacturers responsible for production methods and techniques in the manufacture of standard couplers and standard coupler parts have followed the practice of visiting each other's plants and the plants of other foundrymen for the purpose of informing themselves as to general foundry production techniques. In 1946 the cost accountants of some of the defendant manufacturers exchanged among themselves basic data with respect to the costs of their respective employers incurred in the production of certain standard couplers, standard coupler parts and yokes; and from 1945 until 1950 the cost accountants of these defendant manufacturers and other foundrymen visited each other's plants and met together from time to time to exchange views on cost accounting techniques and principles relating to the foundry and steel castings business generally. These visits and exchanges of information were not made as a part of or in furtherance of any conspiracy to fix prices, but rather were for the purpose and had the result of actually reducing manufacturing costs, developing new methods of manufacture, and increasing efficiency in both manufacturing and accounting processes. The exchange of information so resulting encouraged rather than restrained competition among the defendant manufacturers. During the visits of production experts and ac-

countants of the defendant manufacturers to each other's plants, the prices of standard couplers and standard coupler parts were never discussed.

66. Patent licenses in existence among the coupler manufacturers since January 1, 1945 have included customary provisions requiring the licensee to report to the licensor monthly shipments of couplers and coupler parts by the licensee. Prior to 1951 the licenses granted by National Malleable required the licensee to report orders received as well as shipments. Prior to 1953 the licenses granted by ASF contained a similar requirement that licensees report orders received. The information contained in such reports has been used only for purposes of internal management and sales promotion and has had no restraining effect upon competition.

67. Since January 1, 1945 there has been no effort whatsoever on the part of any of defendant manufacturers to restrict the volume of business done by any other of the defendant manufacturers.

68. As established by evidence offered by both plaintiff and certain of the defendants, the respective percentages of the total shipments of standard couplers and standard coupler parts of all the defendant manufacturers enjoyed by each of them have varied substantially from year to year since January 1, 1945, and have never conformed to the quotas previously in existence during the period of the Standard Coupler Agreement of 1916.

69. Since January 1, 1945 there has been no effort by those of defendant manufacturers owning patents covering features embodied in any standard coupler or standard coupler parts to limit or restrict the amount of business done by its licensees.

70. At all times since January 1, 1945 each of the defendant manufacturers has had surplus and unused capacity for the production of standard couplers and standard coupler parts. Despite the most intense competition

for business in standard couplers and standard coupler parts, no defendant manufacturer has, at any time since January 1, 1945, been able to sell as many standard couplers or parts as it has the capacity to produce.

71. Although the vast majority of all standard couplers and standard coupler parts are produced as castings, without machining, they are at the same time produced to unusually close tolerances, as close as 1/32nd of an inch, and despite this since January 1, 1945 they have been consistently sold at average prices of approximately three-fifths the average prices of miscellaneous steel castings.

72. For a manufacturer to equip a foundry, already established and equipped to produce steel castings, to produce only the standard types E, H and F couplers and parts therefor would cost in excess of Nine Hundred Thousand Dollars.

73. Since January 1, 1945 no manufacturer other than defendant manufacturers, after investigation of the business has sought to invest venture capital to manufacture and sell standard couplers or standard coupler parts, and because of the economic factors prevailing in the business there is no probability that any new manufacturer will desire so to do in the future.

74. During the period of approximately thirty years from the date of the original execution of the Standard Coupler Agreement of 1916 until its termination in 1945, none of the defendant manufacturers or the Board of Trustees issued licenses to manufacture standard couplers or standard coupler parts in the United States to others than defendant manufacturers. During this period National Malleable responded to two communications from concerns inquiring as to coupler manufacturing and licensing, in substance, that since the standard "D" coupler was manufactured under patent licenses and that manufacture under these licenses had been arranged for some time, it could not negotiate concerning such matters. The

Board of Trustees responded to six communications, the last of which was received in 1937, concerning patent licensing in connection with the manufacture of standard couplers or standard coupler parts, stating generally in substance in each instance that the items were manufactured under patent licenses; that production capacity of the existing licensees was equal to or in excess of the probable demand; and that therefore it seemed unwise to issue further patent licenses at that time. In 1941 the Board of Trustees responded to an inquiry concerning the manufacture of yokes that, since the existing manufacturers were all equipped to turn out almost any quantities of these yokes that might be required at reasonable prices, there did not appear to be any necessity for bringing other capacity into production of the yokes in question. On two occasions by the Board of Trustees and one occasion by defendant National Malleable notices of patent infringement were addressed to persons who were alleged to have been manufacturing couplers including features of the standard coupler covered by patents owned by one or more of defendant manufacturers.

75 In light of the credible and convincing oral testimony and the uncontradicted documentary evidence which establishes, not only the changes made by the defendant manufacturers in the conduct of their respective businesses at or about the time of the cancellation of the Standard Coupler Agreement of 1916, but also the manner in which each defendant manufacturer has conducted its business and the unrelenting competition which has prevailed among the defendant manufacturers since the cancellation of the Standard Coupler Agreement of 1916, no inference is drawn from any of the evidence with respect to the conduct of defendant manufacturers prior to January 1, 1945, that they are now presently conspiring to or presently intend to violate the antitrust laws or that there is any present threat that they will do so in the future.

76. Since January 1, 1945 no one other than the defendant manufacturers, has evidenced any serious interest in obtaining the right to manufacture standard couplers, standard coupler parts or standard yokes. The Southern Railway did not request a license for manufacturing rights and by its own admission only "toyed" with the idea. Maritime Steel & Foundries, Ltd., sought, not manufacturing rights, but a financial bail-out. Information desired by Sorel Industries, Limited, regarding coupler drawings and dimensions was furnished. Pratt and Letchworth, after receiving advice as to how it could obtain both know-how and manufacturing rights for yokes, made no effort whatever to obtain them. The only other inquiry received by defendant manufacturers after January 1, 1945 concerned drawings, and was from a hobby house, "Doc Fixit". In the light of the direct, credible and convincing oral evidence, and the uncontradicted documentary evidence to the contrary, no inference is drawn from the facts found in this paragraph of these findings that the defendant manufacturers or any of them presently intend to conspire or are conspiring to violate the antitrust laws, or that there is any present threat that they will do so in the future.

77. In the light of the uncontradicted documentary evidence and the testimony of the responsible officers of the defendant manufacturers, which the Court finds credible and accepts, the Court finds that since the cancellation of the Standard Coupler Agreement of 1916 in 1945 and the changes which accompanied it in the manner and method by which the defendant manufacturers conduct their business, the defendant manufacturers have at all times been engaged in vigorous and effective competition in the sale of standard couplers, standard coupler parts and yokes, without any agreement whatsoever to fix prices therefor, to allocate business therein, to divide customers therefor, or otherwise to limit the ability or efforts of any one of said defendant manufacturers to sell all of said

standard couplers, standard coupler parts, and yokes which the exercise of its maximum sales effort will produce in the light of the economic conditions existing. There is no present threat of any change in this situation.

78. None of the defendant manufacturers has any present intent to monopolize the manufacture, sale or distribution of standard couplers, standard coupler parts or standard yokes in or among the several states and Canada. The fact that, since January 1, 1945, no manufacturer other than defendant manufacturers has entered the business of manufacturing standard couplers or standard coupler parts in the United States has resulted from economic forces beyond the control of defendant manufacturers, and not from their conduct either before or after January 1, 1945.

79. Neither AAR nor any of its predecessors has boycotted or agreed with defendant manufacturers or with anyone to boycott the purchase or use of non-standard couplers or coupler parts, and AAR would have no objection if persons or corporations other than the defendant manufacturers and other than their Canadian licensees were licensed to manufacture AAR standard couplers.

80. There is no evidence that AAR or any of its predecessors:

(a) has ever owned or controlled any patents on couplers or coupler parts;

(b) has ever had any contract right or any other right to compel the holders of patents on couplers or coupler parts to grant licenses thereunder;

(c) has ever sought or attempted to prevent the holders of patents on standard couplers and parts from granting licenses to anyone;

(d) has ever persuaded or attempted to persuade anyone not to request licenses under such patents.

81. There is no evidence that AAR or any of its predecessors have ever agreed with the defendant manufacturers or with anyone;

(a) that the holders of patents on standard couplers and coupler parts should not grant licenses thereunder to persons or corporations other than the defendant manufacturers;

(b) that member railroads would purchase standard couplers or coupler parts or any other couplers or coupler parts only from the defendant manufacturers, or only from the defendant manufacturers and their licensees;

(c) that AAR or its predecessors would not adopt as standard a coupler or coupler part invented or manufactured by a person or corporation other than the defendant manufacturers; or

(d) that only such couplers and coupler parts as are recommended by the Mechanical Committee of the Standard Coupler Manufacturers or by the defendant manufacturers would be approved as standard.

82. There is not now in existence and there was not in existence at the time the complaint in this case was filed in 1953 and for at least eight years prior thereto, any combination or conspiracy among any or all of the defendants in unreasonable restraint of, or to monopolize, nor did there exist any monopolization of, trade and commerce in couplers, coupler parts and yokes among the several states or with Canada for the purpose of, or with the effect of;

(a) preventing and excluding persons other than defendant manufacturers from manufacturing and selling couplers and coupler parts adopted, approved or designated as standard by the AAR;

(b) fixing and maintaining uniform and noncompetitive prices, discounts, allowances, and other terms and conditions, for the sale of standard couplers, standard coupler parts and yokes;

(c) dividing and apportioning among defendant manufacturers the available business in standard couplers and coupler parts;

(d) excluding others than defendant manufacturers from the manufacture and sale of certain types of yokes, designated as "Y-30", "Y-35", "Y-45", "Y-50", "Y-60", and "Y-65";

nor does there now exist any present threat that any such combination or conspiracy or monopolization will be entered into or carried out in the future by any or all of the defendants.

83. There is not now in existence, and there was not in existence, at the time the complaint was filed in 1953, or for at least eight years prior thereto, any combination or conspiracy among any or all of the defendants in unreasonable restraint of, or to monopolize, nor did there exist any monopolization of, trade and commerce with Canada for the purpose of, or with effect of, suppressing and eliminating competition among and between defendant manufacturers and the two Canadian corporations, Canadian Car and Foundry Company, Ltd., and Dominion Foundries and Steel, Ltd., by any or all of them agreeing that defendant manufacturers will not sell standard couplers and coupler parts in Canada except with the consent of the Canadian corporations, and that the two Canadian companies will not sell said products in the United States; nor does there now exist any present threat that any such combination or conspiracy or monopolization will be entered into or carried out in the future.

84. As used in these findings of fact the words "January 1, 1945" shall be deemed to mean on or about the time of the termination and cancellation of the Standard Coupler Agreement of 1916.

CONCLUSIONS OF LAW

1. None of the defendants is violating or threatening to violate either Sections 1 or 2 of the Sherman Act, 15 U.S.C. Secs. 1 and 2, nor was it violating or threatening to violate such sections of the Sherman Act at the time the

Complaint was filed in 1953, by engaging in an unlawful combination and conspiracy in unreasonable restraint of trade and commerce in couplers, coupler parts or yokes among the several states or with Canada.

2. None of the defendants is violating or threatening to violate either Section 1 or 2 of the Sherman Act, nor was it violating or threatening to violate such sections of the Sherman Act at the time the Complaint was filed in 1953, by engaging in an unlawful combination and conspiracy to monopolize trade and commerce in couplers, coupler parts or yokes among the several states or with Canada.

3. None of the defendants is violating or threatening to violate Section 2 of the Sherman Act, nor was it violating or threatening to violate such section of the Sherman Act at the time the Complaint was filed in 1953, by unlawfully monopolizing trade and commerce in couplers, coupler parts and yokes among the several states or with Canada.

4. There being no present violation, threat of future violation, or present necessity for relief to dissipate the effects of past violations, if any, of the Sherman Act by any of the defendants in the respects alleged in the Complaint, or appearing upon the trial, the relief prayed for by plaintiff should be denied, and the Complaint should be dismissed.

/s/ JAMES C. CONNELL
JUDGE

Date: March 12, 1958